



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2014-0690; FRL- 9919-48-Region-3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Maryland State Implementation Plan (SIP). The revisions incorporate by reference (IBR) the current requirements of the Federal Prevention of Significant Deterioration (PSD) program into the Maryland SIP. Additionally, the revisions will allow Maryland's PSD program to automatically update with any revisions to the Federal regulations. EPA is approving these revisions to Maryland's PSD program in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on **[insert date 60 days after publication in the Federal Register]** without further notice, unless EPA receives adverse written comment by **[insert date 30 days after publication in the Federal Register]**. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2014-0690 by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.

B. E-mail: kreider.andrew@epa.gov.

C. Mail: EPA-R03-OAR-2014-0690, Andrew Kreider, Acting Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2014-0690. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 22, 2013, the Maryland Department of the Environment (MDE) submitted a formal revision (#13-05) to the Maryland State Implementation Plan (SIP). The SIP revision incorporates by reference the most current Federal PSD regulations which are codified at 40 CFR section 52.21, and will allow future revisions to the Federal PSD program to be automatically incorporated into Maryland's SIP.

Maryland has previously adopted a PSD program through an IBR of a date-specific version of the Federal PSD program. The currently approved Maryland SIP incorporates the Federal regulations as published in the 2009 version of the Code of Federal Regulations, and "as

amended by the ‘Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule’ (Tailoring Rule; 75 FR 31514), and the ‘Deferral for CO₂ Emissions from Bioenergy and Other Biogenic Sources under the Prevention of Significant Deterioration and Title V Programs’ (Biomass Deferral; 76 FR 43490).”

EPA took final action to approve Maryland’s IBR of the 2009 version of 40 CFR 52.21 “as amended” by the Tailoring Rule on August 2, 2012 (77 FR 45949). Subsequently, MDE submitted a revision which incorporated the provisions of the Biomass Deferral into the Maryland SIP. On November 16, 2012, EPA took final action to approve that revision (78 FR 13497). EPA’s August 2, 2012 approval incorporated a number of important required elements into Maryland’s PSD program, including those related to the 2008 “Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})” (2008 NSR PM_{2.5} Rule; 73 FR 28321). For PSD sources in Maryland, this required that PSD permits address direct PM_{2.5} emissions as well as precursor emissions (including sulfur dioxide (SO₂) and oxides of nitrogen (NO_x)), established significant emission rates for PM_{2.5} and precursor emissions, and established the requirement to account for condensable particulate matter. On January 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in *Natural Resources Defense Council (NRDC) v. EPA*,¹ issued a decision that remanded the EPA’s rules implementing the 1997 PM_{2.5} NAAQS, including the 2008 NSR PM_{2.5} Rule. The court’s remand of the 2008 NSR PM_{2.5} Rule is relevant to this final rulemaking. This rule promulgated NSR requirements for implementation of PM_{2.5} in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). The D.C. Circuit found that EPA erred in implementing the PM_{2.5} NAAQS pursuant to the general implementation provisions of subpart 1

¹ See 706 F.3d 428 (D.C. Cir. 2013).

of part D of title I of the CAA, rather than pursuant to the additional implementation provisions specific to particulate matter nonattainment areas in subpart 4. The court ordered the EPA to “repromulgate these rules pursuant to Subpart 4 consistent with this opinion.” *Id.* at 437. However, as the requirements of subpart 4 only pertain to nonattainment areas, it is EPA’s position that the portions of the 2008 NSR PM_{2.5} Rule that address requirements for PM_{2.5} in attainment and unclassifiable areas are not affected by the D.C. Circuit’s opinion in *NRDC v. EPA*. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 NSR PM_{2.5} Rule in order to comply with the court’s decision. Accordingly, EPA’s approval of Maryland’s SIP as to the PSD requirements promulgated by the 2008 NSR PM_{2.5} Rule in this action does not conflict with the D.C. Circuit’s opinion.

On October 20, 2010, EPA promulgated additional PSD regulations relating to PM_{2.5}: “Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs), and Significant Monitoring Concentrations (SMC)” (2010 PSD PM_{2.5} Rule; 73 FR 64864). Because Maryland’s currently approved SIP incorporates the 2009 version of the CFR, these provisions are not currently in the Maryland SIP. On January 22, 2013, the D.C. Circuit, in *Sierra Club v. EPA*,² issued a judgment that, *inter alia*, vacated and remanded the SIL provisions at 40 CFR section 52.21(k)(2). Additionally, the D.C. Circuit vacated the SMC provisions at section 52.21(i)(5)(i)(c). In response to the D.C. Circuit’s decision, EPA took final action on December 9, 2013 to remove the SIL provisions from the Federal PSD regulations and to revise the SMC for PM_{2.5} to zero (78 FR 73698). Therefore, the provisions with which the court took issue are not in effect in Maryland and are not being approved into the Maryland SIP as part of this action.

² See 705 F.3d 458, 469.

The 2010 PSD PM_{2.5} Rule also established increments for PM_{2.5} pursuant to the legal authority contained in section 166(a) of the CAA for pollutants for which NAAQS are promulgated after 1977. An increment is the maximum allowable level of ambient pollutant concentration increase that is allowed to occur above the applicable baseline concentration in a particular area. As such, an increment defines “significant deterioration.” The PM_{2.5} increment provisions at 40 CFR 52.21(c) were not affected by the D.C. Circuit’s decision on the 2010 PSD PM_{2.5} Rule, and are therefore being approved into the Maryland SIP with this final approval action.

Additionally, EPA notes that on June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group v. Environmental Protection Agency*,³ issued a decision addressing the application of PSD permitting requirements to greenhouse gas (GHG) emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source (or modification thereof) required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). In order to act consistently with its understanding of the Court’s decision pending further judicial action before the D.C. Circuit to effectuate the decision, the EPA is not continuing to apply EPA regulations that would require that SIPs include permitting requirements that the Supreme Court found impermissible. Specifically, EPA is not applying the requirement that a state’s SIP-approved PSD program require that sources obtain PSD permits when GHGs are the only pollutant: (i) that the source emits or has the potential to emit above the major source thresholds; or (ii) for which there is a

³ 134 S.Ct. 2427.

significant emissions increase and a significant net emissions increase from a modification (*e.g.* 40 CFR sections 51.166(b)(48)(v) and 52.21(b)(49)(v)).

EPA anticipates a need to revise federal PSD rules in light of the Supreme Court opinion. In addition, EPA anticipates that many states will revise their existing SIP-approved PSD programs in light of the Supreme Court's decision. In states that allow future revisions to the Federal PSD program to be automatically incorporated into the SIP as Maryland has done in this case, this will be accomplished as soon as EPA revises the federal PSD rules. The timing and content of subsequent EPA actions with respect to the EPA regulations is expected to be informed by additional legal processes before the D.C. Circuit. EPA is not expecting states to have revised their existing PSD program regulations at this juncture before the D.C. Circuit has addressed these issues and before EPA has revised its regulations at 40 CFR sections 51.166 and 52.21. However, EPA is evaluating PSD program submissions to assure that the state's program correctly addresses GHGs consistent with the Supreme Court's decision.

Maryland's existing approved SIP contains the greenhouse gas permitting requirements reflected in 40 C.F.R. 52.21 after EPA issued the Tailoring Rule. As a result, the PSD permitting program in Maryland previously approved by EPA into the SIP continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT when sources emit or increase greenhouse gases in the amount of 75,000 tons per year (measured as carbon dioxide (CO₂) equivalent CO₂e). Although the approved Maryland PSD permitting program may also currently contain provisions that are no longer necessary in light of the Supreme Court decision, this does not prevent EPA from approving the submission addressed in this rule. Maryland's 2013 SIP

submission does not add any greenhouse gas permitting requirements that are inconsistent with the Supreme Court decision. While this submission incorporates all of 40 CFR 52.21 for completeness, the submission reincorporates PSD permitting requirements for greenhouse gases that are mostly already in the Maryland SIP.

However, this revision does add to the Maryland SIP the elements of EPA's 2012 rule implementing Step 3 of the phase in of PSD permitting requirements for greenhouse gases described in the Tailoring Rule. 77 FR 41051 (July 12, 2012). This rule became effective on August 13, 2012. Specifically, the incorporation of the Step 3 rule provisions will allow GHG-emitting sources to obtain plantwide applicability limits (PALs) for their GHG emissions on a CO₂e basis. The GHG PAL provisions, as currently written, include some provisions that may no longer be appropriate in light of the Supreme Court decision. Since the Supreme Court has determined that sources and modifications may not be defined as "major" solely on the basis of the level of greenhouse gases emitted or increased, PALs for greenhouse gases may no longer have value in some situations where a source might have triggered PSD based on greenhouse gas emissions alone. However, PALs for GHGs may still have a role to play in determining whether a modification that triggers PSD for a pollutant other than greenhouse gases should also be subject to BACT for greenhouse gases. These provisions, like the other GHG provisions discussed previously, will likely be revised pending further legal action. However, this SIP revision does not add new requirements for sources or modifications that only emit or increase greenhouse gases above the major source threshold or the 75,000 tpy greenhouse gas level in 40 CFR 52.21(b)(49)(iv). Rather, the PAL's provisions provide increased flexibility to sources that wish to address their GHG emissions in a PAL. Since this flexibility may still be valuable to sources in at least one context described above, EPA believes that it is appropriate to approve

these provisions into the Maryland SIP at this juncture.

While the automatic IBR of 40 CFR 52.21 being approved into Maryland's SIP through this action will incorporate some regulations that will be revised in subsequent EPA actions to address the Supreme Court decision, approving the automatic IBR into Maryland's SIP at this time will ensure that Maryland's PSD requirements will remain consistent with the Federal regulations at the time of any subsequent revisions EPA makes to the Federal PSD program. In a related matter, on July 12, 2013, the D.C. Circuit, in *Center for Biological Diversity v. EPA*⁴ vacated the provisions of the Biomass Deferral, which had delayed (for three years) the applicability of PSD and title V requirements to biogenic CO₂ emissions. While the ultimate disposition of the Federal regulations implementing the Biomass Deferral has not yet been determined, the deferral expired on July 21, 2014 anyway, and could not presently be used even absent the vacatur. As previously discussed, any future revisions to the Federal regulations will automatically be incorporated into Maryland's SIP. Therefore, while this approval action includes the vacated portions of 40 CFR 52.21(b)(49)(ii)(a), EPA's approval does not conflict with the D.C. Circuit's decision.

II. Summary of SIP Revision

MDE's August 22, 2013 SIP revision request includes amendments to the following provisions of the Code of Maryland Regulations (COMAR): Regulation .01 under 26.11.01 - General Administrative Provisions, and Regulation .14 under COMAR 26.11.06 – General Emission Standards, Prohibitions, and Restrictions. The revisions remove the date-specific IBR of section 52.21, replacing it with an IBR of 40 CFR 52.21 "as amended." As previously discussed, these

⁴ See 722 F.3d 401.

revisions incorporate the current Federal PSD requirements, and will automatically incorporate any future changes to the Federal regulations into the Maryland SIP. EPA is approving the SIP revision in accordance with the CAA and the requirements for PSD permitting programs.

III. Final Action

EPA is approving MDE's August 22, 2013 submittal as a revision to the Maryland SIP. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's Federal Register, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on **insert date 60 days from date of publication in the Federal Register** without further notice unless EPA receives adverse comment by **insert date 30 days from date of publication in the Federal Register**. If EPA receives adverse comment, EPA will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as

meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of

proposed rulemaking for this action published in the proposed rules section of today's Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action.

This action pertaining to Maryland's PSD program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 5, 2014.

W. C. Early, Acting
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart V--Maryland

2. In § 52.1070, the table in paragraph (c) is amended by revising the entry/entries for COMAR

26.11.01.01 and 26.11.06.14. The revised text reads as follows:

§ 52.1070 Identification of plan.

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(c)* * *

EPA-APPROVED REGULATIONS, TECHNICAL MEMORANDA, AND STATUTES IN THE MARYLAND SIP

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.1100
26.11.01	General Administrative Provisions			
26.11.01.01	Definitions	7/8/13	[Insert date of Federal Register publication] [Insert Federal Register citation]	Revised .01B(37)
* * *	* * *	* * *	* * *	* * *
26.11.06	General Emission Standards, Prohibitions, and Restrictions			
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26.11.06.14	Control of PSD Sources	7/8/13	[Insert date of Federal Register publication] [Insert	Revised .14B(1)

Code of Maryland Administrative Regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.1100
			<u>Federal Register citation]</u>	
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